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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1978

VILLAGE OF CARPENTERSVILLE, a Municipal Corporation,

Appellant,

vs.

EDWARD LIMPERIS, Trustee,

Appellee.

Appeal from the United States Court of Appeals
for the Seventh Circuit.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT SOUGHT TO BE REVIEWED

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SUBJECT INDEX

PAGE

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT SOUGHT TO BE REVIEWED 1

PREFACE 2

THE APPEAL SHOULD BE DISMISSED SINCE IT IS NOT WITHIN THE JURISDICTION OF THIS COURT, BECAUSE NOT TAKEN IN CONFORMITY TO STATUTE 4

IF THE APPEAL IS NOT DISMISSED FOR LACK OF JURISDICTION, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE QUESTION ON WHICH THE DECISION OF THIS CASE DEPENDS IS SO UNSUBSTANTIAL THAT FURTHER ARGUMENT IS NOT WARRANTED 8

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE 10

TABLE OF AUTHORITIES

Cases

City of New Orleans v. Dukes, 472 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) 5, 6

Doran v. Salem, Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) 7

Hebert v. Crawford, 228 U.S. 204, 33 S.Ct. 484, 57 L. Ed. 800 (1913) 6

In re Federal Photo Engraving Corporation, 54 F.2d 628 (2d Cir., 1931) 7

Mitchell Store Building Company v. Carroll, 232 U.S. 379, 34 S.Ct. 410, 58 L.Ed. 650 (1914) 6

Sherr v. Sierra Trading Corporation, 492 F.2d 971 (10th Cir., 1974) 7

United Gas Pipe Line Company v. Ideal Cement Company, 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed.2d 623 (1962) 6

Watson v. Employer's Liability Assurance Corporation, Ltd., 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1954) 6

Wolf v. Weinstein, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed. 2d 33, reh. den. 373 U.S. 928, 83 S.Ct. 1552, 10 L.Ed. 2d 427 (1963) 10

Statutes

11 U.S.C. §47(c) 4, 6

28 U.S.C. §1254 ..... 4, 5

28 U.S.C. §1254(1) 10

28 U.S.C. §1254(2) 5, 7, 10

28 U.S.C. §2103 ..... 10, 11

Act February 13, 1925, c. 229, §13, 43 Stat. 936 6

Rules

United States Supreme Court Rule 16 1

United States Supreme Court Rule 19 ..... 10, 11

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Appeal from the United States Court of Appeals for the Seventh Circuit.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM JUDGMENT SOUGHT TO BE REVIEWED

Edward Limperis, Trustee in bankruptcy of Phillips Construction Company, Inc., Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves this Honorable Court to dismiss the appeal because it is not within the jurisdiction of this Court, or, in the alternative, to affirm the judgment of the United States Court of Appeals for the

Seventh Circuit sought to be reviewed because it is manifest that the question on which the decision of the case depends is so unsubstantial that further argument is not warranted.

Appellee respectfully submits the following discussion in support of this motion.

PREFACE

The dispute in this case consists of Appellant's refusal to issue building and occupancy permits for the eleven lots owned by Appellee (of which ten of the lots are improved with partially completed single family residences). The lots are interspersed in the eastern half of a subdivision consisting of approximately 200 homesites, 190 of which are completed and occupied by families. Appellant's refusal to issue building or occupancy permits on Appellee's lots is based solely upon Appellant's insistence that Appellee or his purchasers satisfy all of Appellant's demands in regard to completion of public improvements within the subdivision. Appellant demands:

a. That sidewalks be installed on 40 lots of which only 8 are owned by Appellee. (Appellee has at all times stipulated that sidewalks will be installed on his lots).

b. That driveways be installed upon 18 lots of which only 6 are owned by Appellee. (Appellee has at all times stipulated that driveways will be installed on his lots).

c. That parkways be graded upon 68 lots of which only 8 are owned by Appellee. (Appellee has at all times stipulated that parkways on his lots will be graded).

d. That 7 storm sewers be installed or repaired which service all of the 200 homes in the subdivision, not just the 11 lots owned by Appellee.

e. That 5 sanitary sewers be installed or repaired, to service all of the homes in the area of each sewer. Not a single one of the sewers demanded by Appellant is located on a lot owned by Appellee.

f. That 5 water system hydrants and valve boxes be raised or lowered and cleaned. Although the entire water system is installed and has been in use for years, the Appellant demands that Appellee or his purchasers make certain modifications to the hydrants and boxes although not a single one of the hydrants or boxes is located on the Appellee's lots and the hydrants and boxes would provide service to all homes in the vicinity.

g. That already existing public roads be repaved in front of 45 lots of which only 6 lots are owned by Appellee. The roads to be repaved are used by the entire community.

In addition to the foregoing facts, Appellee adopts the statement of the case and the statement of facts set forth in the judgment of the United States Court of Appeals for the Seventh Circuit which is sought to be reviewed. (Jur. St. Appendix I, pp. App. 2 - App. 4). Appellee objects to the Statement of Facts presented by Appellant (Jur. St., pp. 7-8) because it contains numerous assertions which are either inaccurate, unsupported by the record, or irrelevant to the issue in this case.

THE APPEAL SHOULD BE DISMISSED SINCE IT IS NOT WITHIN THE JURISDICTION OF THIS COURT, BECAUSE NOT TAKEN IN CONFORMITY TO STATUTE.

None of the questions which Appellant contends are presented for review (Jur. St., p. 6) are pertinent to the judgment sought to be reviewed. Contrary to Appellant's characterizations of the questions presented by the appeal, the judgment of the Court of Appeals did not involve an interpretation of any "right and authority" of referees in bankruptcy nor did it involve a holding that trustees in bankruptcy were "immune from lawful police-power regulations of a municipality." (Jur. St., p. 6). The only question decided by the Court of Appeals in this case was whether the action of the Appellant in withholding building permits on properties owned by Appellee was authorized by Appellant's ordinance. The Court stated that it was ruling in Appellee's favor simply "[b]ecause we agree with the Trustee that the withholding of permits was not authorized by the Village ordinance . . ." (Jur. St., p. App. 4). In fact, the Court of Appeals specifically *disclaimed* that its decision was in any way based upon federal statutory or constitutional considerations:

> "Since the Village had no authority under the ordinance to withhold permits, we need not consider whether the actions of the Village conflict with any powers granted to the Trustee by the Bankruptcy Act and are therefore invalid under the Supremacy Clause." (Jur. St., p. App. 8).

As Appellant points out, the jurisdiction of this Court to review the judgment of the Court of Appeals depends upon the provisions of 11 U.S.C. § 47(c) and 28 U.S.C. § 1254. (Jur. St., p. 4). 11 U.S.C. § 47(c) vests this Court with jurisdiction to review judgments of courts of appeals in bankruptcy proceedings "in accordance with

the provisions of the laws of the United States now in force or such as may hereafter be enacted." Since this case arises in proceedings under the Bankruptcy Act, the only question remaining is whether the judgment of the Court of Appeals in this case is one which may be reviewed on appeal in accordance with the provisions of 28 U.S.C. § 1254, which governs appeals to this Court from judgments of courts of appeals. In pertinent part, the statute provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> * * *
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"

According to the foregoing statute, an appeal from a judgment of a court of appeals is within this Court's jurisdiction only when the judgment involves the invalidation of a State statute (which has been construed to include a municipal ordinance: *City of New Orleans v. Dukes*, 472 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976)). Nowhere in the opinion of the Court of Appeals is it even suggested that the subdivision ordinance relied upon by the Appellant in this case was invalid. To the contrary, the Court of Appeals *enforced* the ordinance by holding that the Appellant's conduct which conflicted with the ordinance was improper. Therefore, it is clear that the appeal is not within the jurisdiction of this Court because it is not taken in conformity to the provisions of 28 U.S.C. § 1254(2), which is the applicable statute.

Finally, none of the cases cited by the Appellant "to sustain the jurisdiction of this court" (Jur. St., p. 5) support the appeal. When *Mitchell Store Building Company v. Carroll*, 232 U.S. 379, 34 S.Ct. 410, 58 L.Ed. 650 (1914) and *Hebert v. Crawford*, 228 U.S. 204, 33 S.Ct. 484, 57 L.Ed. 800 (1913) were decided, Section 24(c) of the Bankruptcy Act (now known as 11 U.S.C. § 47(c)) provided that judgments of courts of appeals in bankruptcy cases were to be reviewed by this Court by the method of appeal, without reference to other laws. However, the portion of that statute "as regulates the mode of review by the Supreme Court in the proceedings, controversies and cases therein named" was repealed by the Congress in 1925. (Act February 13, 1925, c. 229, § 13, 43 Stat. 936). Therefore, an appeal today certainly draws no support from those two cases.

Three of the cases upon which Appellant relies (Jur. St., p. 5) were appeals to this Court by parties relying upon State statutes or municipal ordinances which had been expressly invalidated by the courts of appeals below: *Watson v. Employer's Liability Assurance Corporation, Ltd.*, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1954) [Louisiana insurance statute had been held repugnant to the Equal Protection, Contract, Due Process and Full Faith and Credit Clauses of the U. S. Constitution by the Court of Appeals]; *United Gas Pipe Line Company v. Ideal Cement Company*, 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed.2d 623 (1962) [license code of City of Mobile, Alabama held repugnant to the Commerce Clause of the U. S. Constitution by the Court of Appeals]; *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) ["grandfather clause" in ordinance of City of New Orleans held repugnant to the Equal Protection Clause of the U. S. Constitution by the Court of Appeals]. All three of the cases were squarely within

the provisions of 28 U.S.C. § 1254(2), and accordingly this Court held that the appeals were within its jurisdiction under the statute. Those cases lend no support to Appellant's claim of jurisdiction, since this case is not within 28 U.S.C. § 1254(2).

Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) also cited by Appellant (Jur. St., p. 5) is likewise inapplicable to this case. In *Doran*, the Court noted that it was unclear whether the Court of Appeals had actually held a municipal ordinance there in question to be unconstitutional, since the appeal was not from a judgment on the merits but from an order affirming a preliminary injunction. This Court also questioned whether it could entertain an appeal under 28 U.S.C. § 1254(2) when the review sought was not from a final judgment. In view of its uncertainty concerning the foregoing questions, the Court dismissed the appeal. 422 U.S. at 927.

The remaining cases upon which Appellant relies (Jur. St., p. 5) to sustain its claim of jurisdiction in this case are *Sherr v. Sierra Trading Corporation*, 492 F.2d 971 (10th Cir. 1974) and *In re Federal Photo Engraving Corporation*, 54 F.2d 628 (2d Cir., 1931). Neither case has *any* relation to this Court or its jurisdiction.

For all of the foregoing reasons Appellee respectfully submits that the instant appeal is not in conformity to the provisions of 28 U.S.C. § 1254(2), therefore is not within the jurisdiction of this Court, and should be dismissed.

IF THE APPEAL IS NOT DISMISSED FOR LACK OF JURISDICTION, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE QUESTION ON WHICH THE DECISION OF THIS CASE DEPENDS IS SO UNSUBSTANTIAL THAT FURTHER ARGUMENT IS NOT WARRANTED.

In the event that this Court does not dismiss the appeal on the basis of the jurisdictional defects discussed *supra*, the judgment of the Court of Appeals sought to be reviewed should be affirmed by this Court without further argument. The best argument for affirmance is the detailed and thorough analysis of the Appellant's ordinance rendered by the Court of Appeals in its unanimous opinion. (Jur. St., pp. App. 1 to App. 8).

The whole case depends upon one question: whether the Appellant's action in withholding building permits on lots owned by Appellee was authorized by the Appellant's subdivision ordinance.

Appellant's assertion that "a monumental and absolutely untrue factual misrepresentation was foisted upon and accepted by the Circuit Court" (Jur. St., p. 9) is incorrect and irrelevant. Appellant complains that the Court of Appeals was misled into believing that the entire subdivision where the lots are located was developed by the bankrupt, Appellee's predecessor in interest, and that Appellant had never before enforced its ordinances respecting the other residences in the subdivision. Whether or not "about half of the 190 residences were built fifteen years ago by a responsible developer" (Jur. St., p. 9) and whether the Appellant enforced its subdivision ordinance against that developer fifteen years ago has absolutely no bearing on this case. What *does* bear on this case is the fact that approximately 190 families live in the subdivision, that half the subdivision was built in 1972 and 1973 by Appellee's

predecessor in interest, and that almost all of the improvements demanded by the Appellant as its price for issuing building and occupancy permits for the Appellee's lots are for the benefit of the entire subdivision, *including* the old portion of the subdivision. The Court of Appeals was not misled.

Appellant states that " . . . the most abrasive aspect of the judgment appealed from is the determination that the Village waived Section 11 of its subdivision ordinance in that the same was not specifically cited." (Jur. St., p. 10). While the Court of Appeals was correct in holding that Appellant waived any claim of lack of utility facilities or road access under Section 11 (Jur. St., p. App. 7), by failing to cite the Section, it should be noted that in fact the utility facilities and road access to the lots required by Section 11 do exist. The necessary utility facilities and roadway access presently serve the 190 families who reside in the subdivision and are available to serve the 11 lots owned by Appellee interspersed amongst those families. The fact that the requirements of Section 11 have been satisfied probably explains why Appellant never cited the Section before.

The conclusion of the Court of Appeals was rendered after extensive discussion which weighed both sides of the case most carefully. Significantly, nowhere in its Jurisdictional Statement does the Appellant show where the Court's interpretation of the ordinance was erroneous. Appellant's complaint stems from the fact that under the Court of Appeals' interpretation of the ordinance, Appellant must resort to remedies with which it is not satisfied. But no other interpretation of the ordinance is offered by the Appellant in its Jurisdictional Statement.

The only question being one of statutory construction, and the question having received full consideration by the Court of Appeals, the unanimous opinion of that Court should be affirmed by this Honorable Court without further argument.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE.

As discussed *supra*, appellate review is not the proper mode of review in this case under 28 U.S.C. § 1254(2). However, 28 U.S.C. § 2103 provides that this Court may regard and act upon papers filed in an improvidently taken appeal as a petition for writ of certiorari. Unquestionably, this Court has discretion under 28 U.S.C. § 1254(1). to review the judgment of the Court of Appeals by writ of certiorari (although it should be noted that Appellant has made no request for such review). However, Appellee respectfully submits that it would be improvident to grant a writ of certiorari as to the judgment of the Court of Appeals in this case for the judgment presents no federal question for decision. In *Wolf v. Weinstein*, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed.2d 33, reh. den. 373 U.S. 928, 83 S.Ct. 1522, 10 L.Ed.2d 427 (1963), this Court dismissed a writ of certiorari which it had granted concerning a judgment of the Court of Appeals for the Second Circuit stating that the writ had been improvidently granted because the judgment "primarily implicates questions of Pennsylvania law and presents no federal question of substance." 372 U.S. at 636. In this case, there is no federal question presented at all. Moreover, none of the considerations governing review on certiorari delineated in Rule 19 of the Rules of this Court are present in this case. Appellee submits

that since there are no "special and important reasons" (as required by Rule 19) for further review in this case, this Court should not in its discretion entertain the appeal as a petition for a writ of certiorari under 28 U.S.C. § 2103.

Respectfully submitted,

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